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DEPARTMENT OF LABOR AND INDUSTRIES
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ATTORNEY GENERAL
OF WASHINGTON

January 12, 2006

Rob McKenna, Attorney General
Office of the Attorney General
P. O. Box 100
Olympia, WA 98504-0100

RE: Comments on proposed Public Records Act model rules
WAC Chapter 44-14

Dear Mr. McKenna:

Rob

This letter has a twofold purpose: first, to express my appreciation and support for the public records model rules your office is advancing; and second, to offer my comments for your consideration.

The fact that you went to the public for input by holding hearings *before* writing the model rules is commendable. It helps produce rules that work for the people, because they begin with the people.

I especially appreciate the guidance in the rule comments regarding electronic records. State agencies have been dealing with electronic files for over 20 years, yet there have been very few laws passed that guide agencies in handling requests for electronic data. The model rules comments not only suggest electronic records as an acceptable alternative to inspecting and copying paper originals, but also provide specific guidance on when and how an agency is to provide and charge for electronic records.

There are many other good points in the model rules and comments including the suggestion of dispute resolution as an alternative to filing lawsuits against public agencies, and clarification between mandatory statutory confidentiality and discretionary exemptions.

While guidance on these and other things in the model rules is long overdue, I noticed an absence of input from what might be termed an administrative source. For balance, I believe that on at least some topics, an administrative viewpoint also should be considered in the final comment guidance language.

For example, there is the issue of "reasonable estimates" of response time to public records requests. Model rule comment # 44-14-04003(5), page 24, states,

"Form letter thirty-day estimates are almost never 'reasonable' because an agency, which has the burden of proof, could not prove that every single request it receives would take the same thirty-day period."

While this statement makes logical sense, it does not consider that a final response estimate of "within 30 days" (as used by L&I) was developed as a production management tool. Our requests regularly include many records from a large number of programs within the agency.



Researching and calculating a “reasonable estimate” under the new model rules could easily take well over five business days, due to the following four factors:

- The time needed to notify third parties affected by a request and allow them to either contact the requestor and receive a reply, or file a motion for injunction with superior court and obtain a hearing date, per RCW 42.17.330;
- The length of time a superior court will take to hold a hearing and issue a decision from the date a motion for injunctive relief is filed;
- The time needed to receive and review/redact the requested records from the programs that own the records, to know whether a third party needs to be contacted; and
- The indeterminate amount of time needed to complete an investigation report, if a request for the report is received while the investigation still is open.

With the current emphasis on agency accountability to the public, one of our performance measures is the mean time from receipt of our requests to the time they are delivered. Because these requests are time-sensitive, we want to respond as quickly and accurately as possible, to streamline and minimize our handling and processing. If we adopt the “reasonable estimate” standard in the current model rules, it could add process steps to our handling of public records requests and potentially require additional records management staff. This would have a negative impact, both upon our ability to respond timely to our requestors and on our mean response time performance measure.

Another issue of concern is mentioned in model rule 44-14-080 and comments 44-14-08001 and 44-14-08004(1). It is the two-business-day time limit on both filing and responding to petitions for review of an agency’s denial of a public records request. Last spring, when we requested stakeholder comment on our proposed revision of Labor and Industries’ Public Records rules (WAC Chapter 296-06), we received remarks of discontent, both from customers and staff, about the brevity of the two-business-day period to file a petition with our public records officer for review of a records denial. Staff said that some petitions for review require more research and review than two business days will allow. One public sector stakeholder wrote,

“A 48 hour response does not leave enough time for someone to seek advice or conduct their [sic] own research in order to prepare a substantive petition.”

And,

“A 48 hour response is so short and unusual that it could be construed as being unreasonable...an administrative law judge or superior court judge may allow someone’s untimely petition anyway, especially if they had a compelling excuse.”

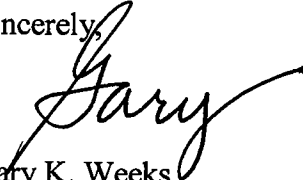
Additionally, we have learned that other agencies are providing petitioners with an estimated time of final response within the two-business-day period, and their final response later. These agencies are doing this because the two-business-day time limit is insufficient to research and complete a final review of denial. We would appreciate your feedback on a method that would allow both petitioners and agencies to have more response time flexibility in this area.

If you have any questions or for further clarification, please feel free to call me. I know

Rob McKenna
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Joe Molenda of my staff has been in communication with your office on these model rules as well. Thank you for your efforts, and those of Mr. Overstreet and your office staff to make public agency records more accessible to the people of Washington State.

Sincerely,



Gary K. Weeks
Director

cc: Greg Overstreet, Special Assistant Attorney General
Judy Schurke, Deputy Director for Operations
Cynthia Harris, Assistant Director for Administrative Services